CASES AND MATERIALS
ON THE LAW
OF TORTS
EXPERIMENTAL EDITION
PART I

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CHAPTER I: INTRODUCTION

Section 1

The Nature and Purpose of the Law of Torts

The recognition of the Law of Torts as a sufficiently singular body of law to merit identification by a rubric and segregated consideration in a legal treatise goes back only to about 1860 when an Englishman and an American published books on the subject. The word "tort", of course, was to be found both in English and French long before, and in both languages it meant "wrong". It had equivalents in Spanish and Italian and derived from the Latin "tortus", meaning "twisted" or "wrung". And, rubrics aside, the kind of problem with which this branch of the law concerns itself has been around as long as people have lived together in society, and has called for, and received, legal attention.

Wherever people live together in society the activities of some invade the interests of others and cause harm, sometimes intentionally, sometimes negligently, sometimes quite by accident. In England, let us say about the year 1066, the harm tended to be inflicted in fairly straight-forward fashion upon fairly tangible interests. People struck each other, or threatened to, spoke ill of each other, went on each other's land, and seized possession of or damaged horses and cows, pigs and sheep and various items of inanimate personal property as well. To preserve the King's Peace and prevent aggrieved individuals from relying on self-help (or going without a remedy altogether) the Norman, and especially the Angevin kings sent judges about the country to settle disputes peaceably. In others words, to apply to them a Law of Torts, nameless though it still might be.

These royal courts were not, of course, the first courts in England to deal with such problems. Indeed the history books all say that the royal courts wrested jurisdiction away from local courts, to the disgruntlement of the barons who included the issue in the Magna Carta, in the long run to no avail. But that is another story. The point of concern here is that the royal courts were the first courts developing and applying a law common to all England, thereby giving birth to the title by which the English system of law became known. Prior to the Conquest there had simply never been a central government strong enough to construct such a centralizing and homogenizing institution.

Centuries later the Common Law system spread round the world with English settlers and colonists and it continues to prevail in the Anglophone provinces of Canada, the English-speaking countries, including the United States of America, and numerous other present and former parts of the British Empire and Commonwealth. So the activity of the royal courts in post-Conquest England constituted the genesis of our Law of Torts, albeit the present generation may show scant family resemblance to its distant progenitor.

It is perhaps needless to say that the royal courts were concerned with settling disputes other than those arising out of the injuries inflicted on some by the activities of others. Those other disputes do not concern us much in this course, however, and so, our focus is almost exclusively on the injuries, the kind of conduct causing them, and what the courts have done about it all. This is a field where the law is mostly judge-made.

Down through the centuries, as society developed and grew more complex, the opportunities for harmful contact increased, and activities capable of causing harm waxed more numerous, and the interests open to be invaded became more diverse and not quite so corporeal. The Law of Torts developed more or less apace. It fell to the industrial revolution of the 18th and 19th centuries, however, to do for the Law of Torts what Henry Ford did for the automobile: bring it into the big time. It generated new interests and created opportunities and instrumentalities for invading them by bringing more people into the close contact of urban life, putting them to work in factories with machines, sending them travelling on new roads and new rails, and encouraging them to compete for business in the mushrooming field of commerce. It remained for the 20th century to develop the most destructive activity yet, motoring, and to add to it, the radio, television, the aeroplane, the computer and various kinds of looking and listening devices. In the course of it all, in addition to interests in physical integrity, honour and tangible property already mentioned, the law has come to recognize as worthy of protection interests in emotional tranquility, family relations and various forms of economic and commercial relations and prospects. Neither the list of activities causing harm nor the list of interests which the law will protect is closed.

In early times, compensation to the injured individual and penalties to the Crown might figure as remedies in the same court proceedings. In other words, not only was there no well-defined Law of Torts, there was not even a clear-cut distinction between criminal and civil law. But the first treatise of the common law, published in 1187 and attributed to Ranulf de Glanvill, remarked that "some pleas are criminal, and some are civil". Lord Mansfield in Atcheson v. Everitt, (1755) 1 Cowp. 382 at 391, 98 Eng. Rep. 1147 said "Now there is no distinction better known, than the distinction between civil and criminal law; or between criminal prosecutions and civil actions." And Windfield in his treatise the Province of the Law of Tort, in 1931, indicated (p. 201) that "Tort can be distinguished from crime in that the sanction for crime is punishment, while the sanction for tort is an action for damages."

So now we can say the criminal law proscribes anti-social behaviour under penalty of fine or imprisonment. The Law of Torts concerns itself only with reparation to the individual for the harm done.

Or is it that simple? Consider the following cases.

Section 2: The Origin of the Law of Torts: Herein of the Forms of Action

> So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure; and the early lawyer can only see the law through the envelope of its technical forms.
>
> Maine, Early Law and Custom, (1883)

Many conflicts which fall within the province of the Law of Torts (and other branches of the law for that matter) are settled by agreement between the parties. When a person who has suffered damage agrees to a certain sum by way of compensation, to accept a promise that something-or-other will not be done any more, to forgive and forget, or when an individual who has inflicted damage agrees to pay up, to cease and desist, to say he is sorry, the agreement may or may not be based on a keen regard for the true facts and the strict legal position. Many other factors can have a bearing on decisions of this sort; whether or not one has a well-developed sense of outrage, how badly and how quickly one might need the money, whether or not one wants to go to the expense and trouble of a lawsuit, how sure one could be of winning if one did, and so on. But when a conflict within the province of the Law of Torts is not settled by agreement then it normally falls to be resolved by a court and a court must try as hard as it can to find the true facts (what really happened between the parties to give rise to the conflict) and must apply the appropriate law to those facts (decide in accordance with the prevailing theory of liability whether the damager must compensate the damaged).

The procedure by which a dispute is brought before a court to have the facts determined and the law applied is called an action. The form an action is required to take is pretty well standard even though the facts and the relevant law may vary greatly. Commonly a writ is issued out of the court office, at the instance of the party seeking redress, directing the other party to defend the case or suffer the consequences. Pleadings and various discovery procedures help inform each side concerning the case which will be presented by the other, and eventually the matter comes to trial before the court (a judge, or a judge and jury). The emphasis is, or is intended to be, on getting at the facts as economically and expeditiously as possible so that the proper law may be selected and applied. This is, however, a relatively modern procedural achievement.

Until the late 19th century the form that an action took varied considerably according to the nature of the claim being prosecuted. And in early times, the form of the action seems to have been more important than the facts of the case or the law to be applied. This historical verity had a considerable bearing on the growth of a theory, or theories, of liability, and even into the 20th century it has had a strong impact on the way the courts think about and apply theories. So by way of background to Section 3, which will deal with the growth of the fault theory, we must try to understand a bit about the forms of action at Common Law.

Section 3: The Development of Liability Based on Fault

Modern tort law emphasizes the nature of the defendant's conduct: did he intend the plaintiff's injury or was he negligent with respect to it? In the vast majority of tort cases unless one of these forms of fault is present the defendant will escape liability. Torts like assault, battery, and false imprisonment, all descendants of the old writ of trespass, today require intentional conduct. Negligence, as a separate basis of modern tort liability, is a descendant of the old writ of trespass on the case. As we saw in the last section, however, the important historical distinction between trespass and case lay in the nature of the causal connection between the defendant's conduct and the plaintiff's injury, not in a distinction between kinds of fault. If the injury was traceable directly to the defendant's conduct, trespass was the proper remedy, if merely consequential from that conduct, case. Both might involve intentional or negligent conduct on the defendant's part, but, while case always required one or the other form of fault, trespass did not. Historically strict liability could be imposed in trespass.

Many of the cases in Section 3 are concerned with the gradual shift in emphasis in trespass and case from the causal connection to the nature of the defendant's conduct, and the eventual acceptance of fault as an essential element in both actions. But as some of the cases indicate, procedural differences based on the distinction between direct and indirect injuries may still survive. As a result there may still be some truth in Professor Maitland's famous aphorism (supra, p.44) that "the forms of action we have buried, but they still rule us from their graves".

The last two cases in this chapter raise questions about the wisdom in requiring fault in at least certain kinds of tort actions.

THE CASE OF THORNS

1466. Year Book, 6 Ed. IV, 7, pl. 18 (as reported in Bessey v. Olliot & Lambert (1681), T. Raym. 467; 83 E.R. 244)

Trespass quare vi & armis clausum fregit, & herbam suam pedibus conculcando consumpsit in six acres. The defendant pleads, that he hath an acre lying next the said six acres, and upon it a hedge of thorns, and he cut the thorns, and they *ipso invito* fell upon the plaintiff's land, and the defendant took them off as soon as he could, which is the same trespass; and the plaintiff demurred; and adjudged for the plaintiff; for though a man doth a lawful thing, yet if any damage do thereby befal another, he shall answer for it, if he could have avoided it. As if a man lop a tree, and the boughs fall upon another *ipso invito*, yet an action lies. If a man shoot at butts, and hurt another unawares, an action lies. I have land through which a river runs to your mill, and I lop the fallows [468] growing upon the river side, which accidentally stop the water, so as your mill is hindered, an action lies. If I am building my own house, and a piece of timber falls on my neighbour's house and breaks part of it, an action lies. If a man assault me, and I lift up my staff to defend myself, and in lifting it up hit another, an action lies by that person, and yet I did a lawful thing. And the reason of all these cases is, because he that is damaged ought to be recompensed. But otherwise it is in criminal cases, for there *actus non facit reum nisi mens sit rea.*

CHAPTER II INTENTIONAL INTERFERENCE WITH THE PERSON

Assault, battery, and false imprisonment, as decendants of the old writ of trespass, were actionable without proof of injury. All the plaintiff need prove was that the defendant interfered directly with his person. Today, however, as we saw in section 3 of the last chapter, these torts probably require intentional conduct by the defendant. The defendant must have intended to interfere with the plaintiff, although actual injury is still unnecessary. Among other matters the cases in this Chapter explore the meaning of intention and how it differs from motive.

Another matter raised by this Chapter is the nature of the interest protected in cases involving intentional interference with the person. Is it the physical person of the plaintiff, or his feelings, or both? Battery requires physical contact with the plaintiff, but no real injury, and it often seems as if it is his outraged feelings that are being protected. In assault actions, where the essence of liability is apprehension of contact, clearly a purely mental element is involved. And the controversy in the false imprisonment cases over whether the plaintiff must be aware of the imprisonment at the time it occurs emphasizes the dichotomy between the physical person of the plaintiff and his feelings. The intentional infliction of mental suffering cases are concerned directly with the emotional state of the plaintiff, although many jurisdictions require as a condition of recovery that substantial physical or other consequences accompany the mental disturbance.

Some of the cases in Section 3 of this Chapter move from the protection of the plaintiff's person to the protection of a property interest he may have in his name or photograph. From one aspect, the unfair business practices involved in such cases can be viewed as invasions of the plaintiff's privacy, and privacy is expressly recognized as one of the bases of liability in the American cases reproduced towards the end of the Chapter. Although invasion of privacy, as such, has not been recognized by Canadian courts, recent Canadian legislation aimed at controlling, among other things, wiretapping and credit reporting agencies is concerned with various aspects of privacy.

Section 1: Assault and Battery

COLE v. TURNER

Nisi Prius. 1705. 6 Mod. 149; 87 E.R. 907

Holt, Chief Justice, upon evidence in trespass for assault and battery, declared,

First, that the least touching of another in anger is a battery.

Secondly, if two or more meet in a narrow passage, and without any violence or design of harm, the one touches the other gently, it will be no battery.

Thirdly, if any of them use violence against the other, to force his way in a rude inordinate manner, it will be a battery; or any struggle about the passage to that degree as may do hurt, will be a battery (*a*).

Note, It was in action of battery by husband and wife, for a battery upon the husband and wife, *ad damnum ipsorum;* and though the plaintiff had a verdict, yet the Chief Justice said, he should never have judgment.

And the judgment was after arrested above upon that exception.

CHAPTER III: INTENTIONAL INTERFERENCE WITH PROPERTY

Trespass to land, like the various trespasses to the person descended from the old writ of trespass, is, like they are, actionable without proof of injury. The unauthorized entry on the land is considered sufficient injury in itself. However, the possibility of strict liability for trespass to land has persisted much longer in our law than it has with respect to other forms of trespass. Nevertheless, today we can probably say that in a trespass to land action the defendant must have intended the invasion, although the question of whether strict liability could still be imposed was mooted in a Canadian case in Section 1 as recently as 1959. And a vestige of strict liability remains in the rule that once the defendant is found to be a trespasser on the plaintiff's land he is liable for any damage he does without regard to his fault.

Some of the cases in Section 1 are concerned with the nature of the interest being protected: sometimes under the guise of trespass to land the real interests being protected seem to be economic or personal. Other cases in the section are concerned with an occupier's right to turn a licensee into a trespasser by terminating his license.

The cases in Section 2 on trespass to goods and conversion, although a barely adequate introduction to a technical subject, furnish further fact situations for exploring the meaning of intent and how it differs from motive. The distinction between trespass to goods and conversion is one between minor and major interferences with chattels, and can be a difficult one to draw.

Under the rubric of nominate torts like conspiracy, intimidation, defamation and nuisance, the cases in Section 3 are concerned with protecting certain economic interests against unfair business practices. These interests, involving as they do the jobs and businesses of people, seem closer to property interests than to personal interests, although the affinity between the tort of intimidation and such personal torts as assault and intentional infliction of mental suffering seems clear.

Section 1: Trespass to Land

ENTICK v. CARRINGTON
Common Pleas, 1765. 19 State Trials 1029

LORD CAMDEN, L.C.J. ... By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without any licence but he is liable to an action, though the damage be nothing. ...

SMITH v. STONE
King's Bench 1647 Style 65; 82 E.R. 533

Smith brought an action of trespasse against Stone pedibus ambulando, the defendant pleads this speciall plea in justification, viz. that he was carryed upon the land of the plaintiff by force, and violence of others, and was not there voluntarily, which is the same trespasse, for which the plaintiff brings his action. The plaintiff demurs to this plea: in this case Roll Iustice said, that it is the trespasse of the party that carryed the defendant upon the land, and not the trespasse of the defendant: as he that drives my cattel into another mans land is the trespassor against him, and not I who am owner of the cattell.

BASELY v. CLARKSON
Common Pleas 1680 3 Levinz 37; 83 E.R. 565

Trespass for breaking his close called the *balk* and the *hade*, and cutting his grass, and carrying it away. The defendant disclaims any title in the lands of the plaintiff, but says that he hath a *balk* and *hade* adjoining to the balk and hade of the plaintiff, and in mowing his own land he involuntarily and by mistake mowed down some grass

CHAPTER IV: DEFENCES TO ACTIONS FOR INTENTIONAL INTERFERENCE WITH PERSON AND PROPERTY

A defendant who intentionally invades a plaintiff's interests may escape liability in a number of ways, some of which we have already seen. For example, in section 3 of the last chapter we saw that a defendant may intentionally interfere with a plaintiff's economic interests without incurring liability when that interference is the inevitable result of pursuing his own legitimate interests. And in the next chapter we will see other examples of defendants escaping liability for what is prima facie intentionally tortious conduct.

In this Chapter we will deal with four distinct defences: consent, self-defence and defence of others, protection of property, and legal authority.

Section 1: Consent

"The pronounced individualism of the common law is reflected in the axiom that no wrong is done to one who consents - volenti non fit injuria. The courts have traditionally adhered to John Stuart Mill's postulate that, save in exceptional circumstances, it is not the law's function to save a man from himself rather than leave him free to dispose of his own interests as he pleases". Fleming, Law of Torts, 5th ed. 1977, at p. 77 (footnote omitted).

The most interesting and important consent cases involve actions against doctors for "surgical assault" (technically battery). Such actions should be distinguished from malpractice actions, where the issue is whether the doctor has been negligent in his treatment of the patient. In the surgical assault cases the patient is not complaining about the adequacy of the treatment, but about the fact of treatment. Normally a doctor must obtain a patient's consent before in any way interferring with his person. Normally a doctor's failure to obtain consent results in a judgment against him for surgical assault.

The medical cases in this Section are concerned first with the questions of when consent is necessary and who can give it when it is necessary, and second with the question of how much the doctor has to tell the patient in order to make his consent effective. The latter question raises the further question of whether, if the doctor has not told the patient enough, the proper form of action is surgical assault or malpractice.

The last few cases in the Section are concerned with consents obtained by duress or fraud.

AMERICAN LAW INSTITUTE, RESTATEMENT OF TORTS, s. 50

§ 50. Actual and Apparent Assent.

(1) An actual assent is given by words or conduct which are intended to express a willingness to submit to the invasion and are so understood by the person invading the interest.

(2) An apparent assent is given by words or conduct which, while not intended to express a willingness to submit to the invasion, would be understood by a reasonable man to be so intended and are so understood by the person invading the interest.